

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA INDIANAPOLIS DIVISION

In re BRIDGESTONE/FIRESTONE, INC.
ATX, ATX II AND WILDERNESS TIRES
PRODUCTS LIABILITY LITIGATION

MDL No. 1373

Centralized before Hon. Sarah
Evans Barker, Chief Judge
Magistrate Judge V. Sue Shields

AMY BENISHAI, et al.,
Plaintiffs,

v.

Individual Case Number:
IP 00-5076-C-B/S

FIRESTONE TIRE & RUBBER CO.,
BRIDGESTONE/FIRESTONE, INC.,
BRIDGESTONE CORP., SEARS, ROEBUCK
AND CO.,
Defendants.

DEFENDANT SEARS, ROEBUCK AND CO.'S MOTION FOR LEAVE TO FILE CROSS-CLAIM AGAINST DEFENDANT BRIDGESTONE/FIRESTONE, INC. AND INCORPORATED MEMORANDUM IN SUPPORT

Defendant SEARS, ROEBUCK AND CO. ("Sears"), through its undersigned counsel and pursuant to Federal Rules of Civil Procedure 13 and 15 and the local rules of this Court, for its Motion for Leave to File Cross-Claim Against Defendant BRIDGESTONE/FIRESTONE, INC. ("Firestone") and Incorporated Memorandum in Support, states as follows:

1. On or about November 1, 2000, Defendant SEARS served its Answer and Affirmative Defenses to the Complaint filed on behalf of Plaintiffs AMY BENISHAI and

JACK BENISHAI, Individually and as Parents and Next Friends of ALISSA BENISHAI, a minor and on behalf of all others similarly situated ("Plaintiffs").

2. Since that date, Sears has tendered the defense and indemnity in this matter to Firestone pursuant to the terms and conditions of a Letter of Agreement between Sears and Firestone concerning the purchase of Firestone tires. Notwithstanding this indemnity agreement, co-defendant Firestone, refused to accept Sears' tender of defense and indemnity in this matter.

4. Based on the foregoing, Sears seeks to file a Cross-Claim against Firestone for indemnification based on the aforesaid Letter of Agreement. A copy of the proposed Cross-Claim Against Defendant Firestone is attached hereto as Exhibit "A."

WHEREFORE, Defendant, SEARS, ROEBUCK AND CO., respectfully requests this Court enter an Order Granting this Motion for Leave to File Cross-Claim Against Defendant BRIDGESTONE/FIRESTONE, INC., *instanter*, and for such further relief as this Court deems just.

**MEMORANDUM OF LAW IN SUPPORT OF SEARS' MOTION FOR LEAVE TO FILE
CROSS-CLAIM AGAINST DEFENDANT BRIDGESTONE/FIRESTONE, INC.**

The Federal Rules of Civil Procedure relating to cross-claims are intended to avoid circuity of action and to dispose of the entire subject matter arising from one set of facts in one action, and they are remedial and should be liberally construed. Blair v. Cleveland Twist Drill Co., 197 F.2d 842, 845 (1952). Fed. R. Civ. P. 13 (g), 15 (2000). Although the right to file an additional or supplemental pleading is not automatic, a district judge should

freely grant leave to do so when justice requires, absent a substantial reason to deny. Rachman Bag Co. v. Liberty Mut. Ins. Co., 46 F.3d 230, 234-35 (2d Cir. 1995). Determining whether to grant leave is within the Court's discretion, and in exercising its discretion the Court should be guided by the underlying purpose of facilitating a decision on the merits. Filmtec Corp. v. Hydranautics, 67 F.3d 931, 935 (Fed. Cir. 1995), *cert. denied*, 117 S. Ct. 62 (1996).

In this case, justice would be served, and a full and final decision on the merits would be facilitated, by allowing this motion. There is no evidence that the motion is brought for purpose of delay in these proceedings. This case was removed to federal court in September 2000. , and shortly thereafter, was the subject of a Notice of Related Action to the Judicial Panel on Multidistrict Litigation ("Panel"), as a tag-along action. On December 1, 2000, this Court received the First Conditional Transfer Order, which transferred this case to MDL 1373. Since that date, little or no case-specific discovery has been conducted in the case. Although Sears had served discovery on plaintiffs, they have refused to respond, citing a pending motion to remand. Accordingly, the granting of this motion will not cause any delay.

Similarly, Sears did not file this motion with any bad faith or dilatory motive. Despite Sears' tender of defense and indemnity to Firestone on September 7, 2000, and several follow-up written and oral discussions with Firestone's counsel, during which counsel for Firestone indicated that the matter was under consideration by Firestone, and that Firestone "would probably" accept Sears' tender, the company has failed to do so. Thus,

if there have been any dilatory motive in this case, it has been that of Firestone, which has attempted to avoid this cross-claim by attempting to lull Sears into believing that it is accepting the tender of defense, while failing to do so.

Neither Firestone nor any of the other parties to this lawsuit can reasonably claim prejudice by the granting of this motion. Firestone has been on notice since the onset of this litigation that Sears looked to it for indemnification pursuant to the Letter of Agreement between Sears and Firestone concerning the purchase of Firestone tires. Firestone can claim neither surprise nor undue prejudice as a result of this motion.

Nor can it be argued that the proposed amendment would be futile. In this case, Sears is able to state a valid legal claim for indemnification against Firestone. The Letter of Agreement executed by and between Sears (the Purchaser) and Firestone (the Seller) concerning the purchase of Firestone tires expressly requires Firestone to defend and indemnify Sears under the foregoing circumstances. Therefore, Sears is able to state a valid legal claim for indemnification against Firestone and, as a result, this motion for leave to amend should be granted by this Court.

Finally, judicial economy favors the granting of this motion. Denial of this motion will result in the filing of an independent lawsuit for indemnification by Sears against Firestone. Public policy favors disposing of all aspects of a case in one lawsuit.

Based on the foregoing, Sears respectfully requests this Court enter an order granting it leave to file a cross-claim against Firestone.

In re: Bridgestone/Firestone, Inc. - MDL Case No. 1373
Amy Benishai, et al. - Case No. IP-01-5176-B/S
Defendant Sears, Roebuck and Co.'s Motion for Leave to File Cross-Claim

Respectfully Submitted,

SEARS, ROEBUCK AND CO.

BY: _____
One of Its Attorneys

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via Federal Express this ____ day of May, 2001 to the attached Counsel List.

ARNSTEIN & LEHR
Attorneys for Defendant,

In re: Bridgestone/Firestone, Inc. - MDL Case No. 1373
Amy Benishai, et al. - Case No. IP-01-5176-B/S
Defendant Sears, Roebuck and Co.'s Motion for Leave to File Cross-Claim

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In re: Bridgestone/Firestone, Inc. - MDL Case No. 1373
Amy Benishai, et al. - Case No. IP-01-5176-B/S
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FIRESTONE TIRE & RUBBER CO.,
BRIDGESTONE/FIRESTONE, INC.,
BRIDGESTONE CORP., SEARS, ROEBUCK
AND CO.,
Defendants.

DEFENDANT SEARS, ROEBUCK AND CO.'S CROSS-CLAIM AGAINST DEFENDANT BRIDGESTONE/FIRESTONE, INC.

Defendant/Cross-Claimant SEARS, ROEBUCK AND CO. ("Sears"), through its undersigned counsel, in support of its Cross-Claim against Defendant BRIDGESTONE/FIRESTONE, INC., ("Firestone"), states as follows:

1. This is an action for damages that exceed \$ 75,000.00, exclusive of interest, costs and attorney's fees.
2. At all times material hereto, Sears was a New York corporation licensed to and doing business in the State of Florida.

3. At all times material hereto, Bridgestone/Firestone, Inc. was a foreign corporation licensed to and doing business in the State of Florida.

4. This matter has been removed to federal court, and transferred to this Court pursuant to Conditional Transfer Order No. 1, received by this Court on December 1, 2000.

5. Plaintiffs allege that they were passengers in a vehicle equipped with Firestone tires when "Plaintiff Alissa Beneshai (*sic*) was involved in an auto accident while driving through Broward County, on I-95." Plaintiffs' Complaint, & 12.

6. Plaintiffs further allege that Sears is liable because it "designed, manufactured, assembled, distributed, marketed, sold, and installed defective Firestone tires which caused numerous accidents involving injuries. Plaintiffs' Complaint, & 16.

7. In their Complaint, Plaintiffs assert causes of action against Sears based on strict liability (Count VII) and negligence (Count VIII).

8. On or about November 10, 1997, Sears and Firestone executed a Letter of Agreement regarding Sears' purchase of certain tires from Firestone. A copy of the Letter of Agreement executed by and between Sears (the Purchaser), and Firestone (the Seller), concerning the purchase of Firestone P255/70R16 tires, the tires purportedly installed by Sears on the vehicle involved in the accident that is the subject of this action, is attached hereto as **Exhibit A**. It provides, in relevant part, that Firestone (referred to as "Seller") will indemnify Sears (referred to as "Purchaser") as follows:

INDEMNITY- Seller agrees to protect, defend, hold harmless and indemnify Purchaser and Purchaser's agents and distributors from and against any and all claims, actions, liabilities, losses, costs and expenses (including attorneys' fees)... (2) arising out of any actual or alleged death of or injury to any

person, damage to any property, or any other damage or loss, by whomsoever suffered, resulting or claimed to result in whole or in part from any actual or alleged defect in such merchandise, whether latent or patent, including actual or alleged improper construction and/or design of such merchandise, or the failure of such merchandise to comply with specifications or with any express or implied warranties of Seller, or... (4) arising out of the assembly, demonstration, and/or installation of merchandise covered by this Contract, or (5) arising out of or involving the failure to warn or inadequate warnings and/or instructions.

9. The Letter of Agreement between Sears and Firestone was in effect as of the date of the accident alleged in the Complaint.

10. Plaintiffs' allegations against Sears in their Complaint state claims resulting from an "actual or alleged defect" in the subject tire, and/or claims "arising out of the assembly, demonstration, and/or installation of merchandise covered by [the Letter of Agreement]."

11. The Letter of Agreement, which was properly executed by Firestone, clearly requires Firestone to defend and indemnify Sears under the foregoing circumstances.

WHEREFORE, Defendant/Cross-Claimant SEARS, ROEBUCK AND CO., demands judgment against Defendant BRIDGESTONE/FIRESTONE, INC. for all sums that may be adjudged against Sears in favor of the Plaintiffs.

SEARS, ROEBUCK AND CO.

BY: _____
One of Its Attorneys

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via Federal Express this ____ day of May, 2001 to the attached Counsel List.

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